

2009

Stevens-Henager College v. Eagle Gate College,
Provo College, Mosese Longi, Trevor Smith,
Wallace Rogers, Richard Horwitz, Steven Todd
Knecht, and Jana Miller : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

STEVENS-HENAGER COLLEGE,

Plaintiff/Appellant,

v.

EAGLE GATE COLLEGE, PROVO
COLLEGE, MOSESE IONGI,
TREVOR SMITH, WALLACE
ROGERS, RICHARD HORWITZ,
STEVEN TODD KNECHT, and
JANA MILLER,

Defendants/Appellees.

No. 20090815

Appeal from Final Judgment by Third
Judicial District Court, Salt Lake
County, Honorable Robert Faust
District Court No. 040921860

OPENING BRIEF OF APPELLANT

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UTAH APPELLATE COURTS

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Plaintiff/Appellant,

v.

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- Addendum A: Memorandum Decision dated January 30, 2008
- Addendum B: Order Granting Summary Judgment Against Plaintiff On Its Claims Against Eagle Gate College, Provo College And Jana Miller (Breach Of Contract; Violation Of The Uniform Trade Secret Act; Interference With Contractual Relations; Violation Of The Federal Computer Fraud And Abuse Act; Statutory Unfair Competition; And Civil Conspiracy) dated March 10, 2008
- Addendum C: Minute Entry dated May 12, 2008
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Jurisdiction

This court has jurisdiction under Utah Code sections 78A-4-103(2)(a), 103(2)(j).

Statement of Issues, Standard of Review, Preservation

Stevens-Henager College filed claims against Eagle Gate College, Provo College, and Jana Miller (collectively “Eagle Gate”) seeking both injunctive relief and damages under various legal theories. In short, Eagle Gate engaged in predatory hiring of Stevens-Henager employees, had those employees steal computer files containing leads for potential Stevens-Henager students, and then used those leads to increase Eagle Gate’s student population and decrease Stevens-Henager’s student population.

Eagle Gate moved for summary judgment on all claims, not on the ground that Eagle Gate did not engage in the alleged unlawful conduct, but on the sole ground that, as a matter of law, Stevens-Henager could not provide any evidence that it was damaged as a result of Eagle Gate’s unlawful conduct.

Issue 1: Whether the district court erred in ruling that Stevens-Henager had provided no evidence of its damages, where Stevens-Henager did not precisely quantify its damages but did provide evidence that Eagle Gate’s conduct caused the following types of damage: (i) reduced productivity due to lost employees; (ii) costs of hiring and training less productive employees; (iii) costs of advertising and marketing efforts made ineffective when student leads were stolen; (iv) effects of reduced morale on numerous campuses; and (v) lost tuition payments from students who otherwise would have attended Stevens-Henager.

Standard of Review: This court reviews a district court’s grant of summary judgment for correctness and views “the facts and all reasonable inferences drawn

therefrom in the light most favorable to the nonmoving party.” Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600.

Preservation: Stevens-Henager preserved this issue in its opposition to Eagle Gate’s motion for summary judgment. (R. 3311, 3491, 3693.)

After the summary judgment ruling, the district court entered a number of orders based upon its summary judgment ruling. If summary judgment was inappropriate, this court should vacate those subsequent orders.

Issue 2: Whether the district court erred in subsequent rulings that were based, at least in part, upon its erroneous summary judgment ruling, including (i) dismissing Stevens-Henager’s claim for injunctive relief and attorney fees under the Federal Computer Fraud and Abuse Act on the ground that a plaintiff must first prove damages totaling at least \$5,000; (ii) granting a motion in limine to preclude Stevens-Henager from presenting any evidence of damages at trial; and (iii) striking Stevens-Henager’s expert report concerning damages.

Standard of Review: “Since the partial summary judgment set into play the entire chain of subsequent proceedings, we also reverse all subsequent orders and judgments and remand the case for trial.” McKee v. Williams, 741 P.2d 978, 982 (Utah Ct. App. 1987).

Preservation: Stevens-Henager preserved these issues in opposing Eagle Gate’s (i) motion for summary judgment on the Federal Computer Fraud and Abuse Act claim, (ii) motion in limine to preclude Stevens-Henager from presenting any evidence of damages at trial, and (iii) motion to strike the expert report. (R. 3950, 4292, 4293.)

Determinative Provisions

Rule 56 of the Utah Rules of Civil Procedure

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

....

(e) Form of affidavits; further testimony; defense required. **Supporting** and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

Rule 7 of the Utah Rules of Civil Procedure

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

Statement of the Case

I. Nature of the Case

This case involves Stevens-Henager's claims against Eagle Gate and others stemming from Eagle Gate's predatory hiring of Stevens-Henager's employees, those employees stealing Stevens-Henager's confidential computer files containing leads for potential students, and Eagle Gate then using those confidential student leads to increase Eagle Gate's revenues and decrease Stevens-Henager's revenues. This appeal concerns whether (i) Stevens-Henager provided any evidence of its damages in opposing Eagle Gate's motion for summary judgment and (ii) if so, whether various subsequent rulings based upon the entry of summary judgment therefore also should be vacated.

II. Course of Proceedings and Statement of Facts

The claims relevant to this appeal are directed at Eagle Gate College, Provo College, and Jana Miller (collectively "Eagle Gate"). In the complaint, Stevens-Henager sought both injunctive relief and damages for (i) breach of contract; (ii) violation of the Uniform Trade Secrets Act; (iii) interference with contractual relations; (iv) interference with prospective economic relations; (v) violation of the Federal Computer Fraud and Abuse Act; (vi) unfair competition; and (vii) civil conspiracy. (R. 1-30.)

Because the issues on appeal concern whether the district court erred in granting Eagle Gate's motion for summary judgment, all facts will be construed in the light most favorable to Stevens-Henager. Orvis v. Johnson, 2008 UT 2, ¶ 6, 177 P.3d 600. In addition, because Eagle Gate does not dispute liability in its motion for summary judgment, liability must be assumed. Id. Therefore, Stevens-Henager provides only minimal background on the conduct that gives rise to Eagle Gate's liability.

Sometime in 2003, Eagle Gate executed a predatory hiring scheme targeting Stevens-Henager employees, including Stevens-Henager's admissions consultant, Jana Miller. (R. 5-6.) Once Ms. Miller joined Eagle Gate, she recruited other Stevens-Henager employees who also joined Eagle Gate, all in violation of their employment contracts with Stevens-Henager. (R. 6-7.) In addition, Eagle Gate also attempted to steal Stevens-Henager's Polynesian Program by trying to hire Moses Longi and Trevor Smith, who recruited Tongan students for Stevens-Henager. After Stevens-Henager had spent more than \$200,000 on recruiting efforts in the Tongan community, Eagle Gate attempted to recruit these employees to enroll the very students they previously had been recruiting for Stevens-Henager. (R. 7-8.) As a result of the loss of the various employees, Stevens-Henager had to hire and train replacement employees.

After Ms. Miller and the other Stevens-Henager employees joined Eagle Gate, they illegally accessed Stevens-Henager's computer system, misappropriated Stevens-Henager's student leads, and altered the contact information for student leads on the Stevens-Henager computer system (e.g., changing the telephone number) to prevent Stevens-Henager from also contacting those potential students. (R. 7-18.) Eagle Gate then used those student leads to recruit new students to Eagle Gate. (Id.)

A. Eagle Gate's Motion for Summary Judgment

On October 9, 2007, Eagle Gate moved for summary judgment on all claims on the sole ground that Stevens-Henager had failed to "provide evidence of an essential element of the claims," namely damages. (R. 3137.) Eagle Gate did not move for summary judgment limited to a certain category of damages, but instead directed its motion to all claims on the ground that Stevens-Henager could not prove any damages.

Eagle Gate first argued that Stevens-Henager had failed to provide evidence of its damages through various discovery mechanisms such as interrogatories and initial disclosures. (R. 3143-49.) From this, Eagle Gate then concluded that “the lack of any evidence or computation of damages . . . demonstrates that [Stevens-Henager] cannot prove any damages.” (R. 3155.)

On October 25, 2007, Stevens-Henager opposed the motion for summary judgment in three ways: (i) pointing out that Stevens-Henager’s ability to quantify definitively some of its damages required information from Eagle Gate (e.g., which of Eagle Gate’s students were recruited from the lead list stolen from Stevens-Henager); (ii) citing discovery responses that did describe evidence of Stevens-Henager’s damages; and, importantly for purposes of this appeal, (iii) quoting deposition testimony that outlines Stevens-Henager’s damages. (R. 3312-35.) Stevens-Henager argued that the deposition testimony is sufficient evidence of its damages to preclude summary judgment.¹ (R. 3337.) Stevens-Henager also argued that it would provide an expert report with a “detailed calculation of its damages” as soon as Eagle Gate provided documents necessary for that report. (R. 3331, 3337.) While Stevens-Henager represented that “many” of its damages were “quantifiable only through expert testimony,” it did not represent that expert testimony was required to establish all of its damages. (R. 3337.) For that reason, the issue this court must resolve is whether the deposition testimony was sufficient to preclude summary judgment.

¹ Under Rule 56(c) of the Utah Rules of Civil Procedure, summary judgment is inappropriate if deposition testimony demonstrates a “genuine issue as to any material fact.”

B. Evidence of Stevens-Henager's Damages

The deposition testimony provided by Stevens-Henager in opposing summary judgment was as follows: Carol Gastiger—President of Stevens-Henager's Provo Campus—testified that when Eagle Gate engaged in predatory hiring of Stevens-Henager employees, had those employees steal computer files from Stevens-Henager, and then used those stolen files to undermine Stevens-Henager's efforts to recruit new students, Stevens-Henager suffered the following damages: (i) a "loss of the Tongan population" and the money Stevens-Henager spent recruiting that population; and (ii) reduced productivity from the loss of Stevens-Henager's "Admissions Consultant," where the lost consultant had averaged 8 student recruits per month but her replacement at Stevens-Henager averaged only 5 student recruits per month, which resulted in lost tuition dollars. (R. 3332-33.)

Vicki Dewsnup—President of Stevens-Henager's Ogden Campus and Regional Director of Stevens-Henager—testified that Stevens-Henager suffered "tremendous damage" in (i) the costs of "advertising and marketing" that were ineffective when Eagle Gate misappropriated the student leads the advertising and marketing had generated; (ii) the inability of Stevens-Henager to contact its student leads because Eagle Gate's unlawful conduct had left Stevens-Henager without "adequate phone numbers;" (iii) the "damage to morale at the campuses;" and (iv) the "loss of employees." (R. 3333-34.)

Carl Barney—owner of Stevens-Henager—testified that Stevens-Henager had suffered damages of "many millions of dollars" from (i) the "loss of the [student] starts" for "at least two of the campuses, Provo and Ogden," which led to a reduction in "an

income stream over three or four years;” (ii) having “to rebuild the admissions department;” and (iii) the “decline in morale.” (R. 3334-35.)

On November 5, 2007, Eagle Gate filed its reply memorandum, arguing that Stevens-Henager still had provided “no evidence of damages.” (R. 3483 at 2.) Eagle Gate argued that the deposition testimony did not create a disputed issue of fact as to damages because the deposition testimony is “self-serving,” or “wholly speculative,” or “vague.” (R. 3483 at 8.)

C. The District Court Grants Eagle Gate’s Motion for Summary Judgment

On January 30, 2008, the district court granted the motion for summary judgment. (R. 3564.) In its ruling, the court states that “the parties agree that expert testimony is needed in order to establish damages in this case.” (R. 3565.) Of course, Stevens-Henager had only stated that many—not all—of its damages were “quantifiable only through expert testimony.” (R. 3337.) Thus, at most, Stevens-Henager had noted that expert testimony would be needed for certain damages.² (R. 3574:12.)

Moreover, to the extent expert testimony was needed, Stevens-Henager was precluded from providing an expert report when Eagle Gate provided documents to Stevens-Henager only 2 days before the expert report deadline, which, in turn, caused Stevens-Henager to file a motion to extend the expert report deadline. And Stevens-Henager did not provide an expert report because the district court did not resolve the motion to extend discovery deadlines until it ruled on the summary judgment motion.

² In fact, expert testimony is not required here. Even where proximate cause requires expert testimony, damages do not. Fratto v. Hensley, 2009 UT App 107, ¶ 5, 2009 Utah App. LEXIS 110; Sohm v. Dixie Eye Ctr., 2007 UT App 235, ¶ 15, 166 P.3d 614.

(R. 3566.) In addition, Stevens-Henager had pending a motion to compel production of the documents it needed to complete its expert report at the time it filed its motion to extend the expert report deadline. (R. 3492-98.)

Based upon the mistaken assumption that expert testimony was required for Stevens-Henager to prove any damages, the district court granted the motion on the ground that the expert report deadline had passed, and therefore, Stevens-Henager could not introduce expert testimony to substantiate its damages. (R. 3564-68.) The district court cited no case law and provided no analysis as to why the deposition testimony does not create a question of fact concerning damages. (R. 3681.)

On March 25, 2008, Stevens-Henager filed a motion to reconsider the order granting summary judgment. (R. 3693.) In support of the motion to reconsider, Stevens-Henager pointed out that it had provided the court ample non-expert testimony of its damages to preclude summary judgment. (R. 3696.) In addition, Stevens-Henager urged the court to reinstate its request for injunctive relief, as that relief does not require expert testimony of damages. (R. 3696.)

On May 12, 2008, the district court granted the motion to reconsider and reinstated Stevens-Henager's claims to the extent they seek equitable relief instead of damages. (R. 3988.) However, the district court again assumed that Stevens-Henager could not prove any damages without an expert, and therefore, declined to vacate its dismissal of the damage claims because Stevens-Henager had not provided "timely expert reports." (R. 3987.)

D. The District Court Grants Other Motions Based Upon the Erroneous Grant of Summary Judgment

On May 30, 2008, the district court granted Eagle Gate’s motion to strike the report of Stevens-Henager’s damages expert “[b]ased on the Court’s prior rulings,” including the rulings on Eagle Gate’s motion for summary judgment and Stevens-Henager’s motion to reconsider the order granting summary judgment. (R. 3994.) On August 31, 2009, the district court granted Eagle Gate’s motion in limine to exclude any evidence of monetary damages—a motion necessary only because there is evidence of monetary damages—on the ground that the remaining prayer for injunctive relief does not require proof of damages, and therefore, evidence of monetary damages is irrelevant. (R. 4368.) Also on August 31, 2009, the district court dismissed Stevens-Henager’s claim for injunctive relief and attorney fees under the Federal Computer Fraud and Abuse Act on the ground that Stevens-Henager could not prove damages totaling at least \$5,000, a prerequisite for equitable relief and an attorney fees award under the Act. (R. 4366.)

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Summary of the Argument

The district court erred in granting summary judgment on the ground that Stevens-Henager had provided no evidence of its damages. In fact, Stevens-Henager provided deposition testimony from three witnesses that demonstrates how Stevens-Henager suffered damages when Eagle Gate engaged in predatory hiring of Stevens-Henager employees, had those employees steal computer files containing leads for potential Stevens-Henager students, and then used those leads to increase Eagle Gate's student population and decrease Stevens-Henager's student population.

Under Utah law, once a plaintiff provides sufficient evidence of proximate cause, a jury is "entitled to determine the extent of Plaintiff's damages" and the plaintiff does not need to "precisely identify" the extent of its damages. Sohm v. Dixie Eye Ctr., 2007 UT App 235, ¶¶ 17-18, 166 P.3d 614. Rather, "[w]hen evidence supports a finding of the fact of damage, i.e., proximate cause, a defendant should not escape liability because the amount of damage cannot be proved with precision." Id. ¶ 20.

Under Rule 56(c), deposition testimony may be used to demonstrate a "genuine issue as to any material fact." Utah R. Civ. P. 56(c). Stevens-Henager provided deposition testimony that Eagle Gate's unlawful conduct was the proximate cause of a number of different types of damages, including (i) the lost productivity of the experienced employees stolen by Eagle Gate; (ii) the costs of hiring and training less experienced and less productive employees; (iii) the costs associated with ineffective advertising and marketing when Eagle Gate misappropriated the fruits of that advertising and marketing; (iv) the effects of reduced morale on various campuses; and (v) the lost tuition payments from students who otherwise would have attended Stevens-Henager.

Stevens-Henager even quantified the reduction in student recruits after one of its experienced employees joined Eagle Gate as 3 students per month, a number that can easily be translated into lost tuition dollars. The deposition testimony is more than sufficient to create a question of fact concerning damages for the jury. The district court erred in granting the motion for summary judgment.

The district court then based a number of subsequent rulings upon its erroneous summary judgment ruling, including (i) dismissing Stevens-Henager's claim for injunctive relief and attorney fees under the Federal Computer Fraud and Abuse Act on the ground that a plaintiff must first prove damages totaling at least \$5,000; (ii) granting a motion in limine to preclude Stevens-Henager from presenting evidence of damages at trial; and (iii) striking Stevens-Henager's expert report concerning damages.

This court not only should reverse the district court's grant of summary judgment, but also should vacate subsequent rulings based upon the summary judgment ruling.

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Argument

The issue before this court is whether the district court erred in granting Eagle Gate's Rule 56 motion for summary judgment on the ground that Stevens-Henager had not provided evidence of "any damages" sufficient to create a disputed issue of material fact for the jury. Put differently, the issue is whether Stevens-Henager, in opposing Eagle Gate's motion for summary judgment, provided evidence sufficient to create a question of fact as to whether it suffered "any damages" as a result of Eagle Gate's unlawful conduct. As demonstrated below, Stevens-Henager provided ample evidence to preclude judgment as a matter of law. This court should reverse.

Before addressing this issue, however, it is important to be clear about what issues are not before this court. The briefing and rulings in the district court discuss a number of tangential issues, which may have clouded the issues before the district court. What is not before the court is (i) a Rule 11 motion for sanctions concerning the amount of damages listed in the complaint; (ii) a Rule 37 motion for discovery sanctions for failing to cooperate in the discovery process; (iii) a sanction for failure to update initial disclosures under Rule 26(a); or (iv) whether Stevens-Henager could have provided more evidence of damages in opposing summary judgment. Nor does this appeal involve a motion for summary judgment directed at a particular category of damages. Instead, this appeal involves a motion for summary judgment contending that Stevens-Henager could not prove "any damages." (R. 3155.) It is this issue that Stevens-Henager addresses in this brief.

I. Stevens-Henager Provided Sufficient Evidence of Its Damages to Preclude Summary Judgment

Stevens-Henager provided sufficient evidence of its damages in opposing Eagle Gate's motion for summary judgment. Under Utah law, summary judgment is appropriate only when, viewing "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party," there exists "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Sohm v. Dixie Eye Ctr., 2007 UT App 235, ¶ 13, 166 P.3d 614. Importantly, review of summary judgment rulings should be "guided by the general judicial policy that favors a trial on the merits when there is some doubt as to the propriety of a summary judgment." King v. Searle Pharms., Inc., 832 P.2d 858, 864-65 (Utah 1992).

Here, Eagle Gate moved for summary judgment on the sole ground that Stevens-Henager could not prove that it suffered "any damages" as a result of Eagle Gate's unlawful conduct, which consisted of Eagle Gate's predatory hiring of Stevens-Henager's employees, those employees stealing Stevens-Henager's computer files containing leads for potential students, and Eagle Gate then using that confidential information to increase Eagle Gate's revenues and decrease Stevens-Henager's revenues. Apart from the obvious damage resulting from such conduct, Stevens-Henager provided more than enough evidence of its damages to preclude summary judgment.

Below, Stevens-Henager will first outline the legal standard concerning what evidence of damages is required to preclude summary judgment and then set forth the evidence Stevens-Henager provided to demonstrate that Stevens-Henager satisfied that standard.

A. Under Utah Law, Evidence That Unlawful Conduct Was the Proximate Cause of Damage Is Sufficient to Preclude Summary Judgment

Stevens-Henager did not need to precisely identify the extent of its damages in opposing summary judgment. Under Utah law, once a plaintiff provides evidence of an injury, the plaintiff does not need to “precisely identify the extent of Plaintiff’s damages.” Sohm v. Dixie Eye Ctr., 2007 UT App 235, ¶ 17, 166 P.3d 614. Because damages present a question of fact that is “distinctly within the jury’s province,” once a plaintiff provides sufficient evidence of proximate cause, a jury is “entitled to determine the extent of Plaintiff’s damages.” Id. ¶ 18 (quoting Judd v. Drezga, 2004 UT 91, 103 P.3d 135).

In Sohm, like here, the defendant moved for summary judgment on “the extent of Plaintiff’s recoverable damages and Plaintiff’s evidence regarding the same.” Id. ¶ 14. The district court granted summary judgment on the ground that the plaintiff had not provided sufficient evidence of damages. The plaintiff had provided only testimony that plaintiff’s lost vision resulted from medical malpractice, but no evidence of “how much better” plaintiff’s vision would have been in the absence of the malpractice or the monetary value of that loss. Id. ¶ 20. This court reversed, holding that evidence the defendant caused plaintiff to lose some vision was sufficient to allow a jury to award non-speculative damages, even though the plaintiff provided no quantification of damages in opposing summary judgment. Id. ¶ 19. As this court explained, “[w]hen evidence supports a finding of the fact of damage, i.e., proximate cause, a defendant should not escape liability because the amount of damage cannot be proved with precision.” Id. ¶ 20.

Confirming that a quantification of damages is not necessary to preclude summary judgment, this court has held that evidence of the fact of damages at trial is sufficient to

preclude a directed verdict. Renegade Oil, Inc. v. Progressive Cas. Ins. Co., 2004 UT App 356, ¶ 13, 101 P.3d 383. In Renegade Oil, the plaintiff presented evidence that but for the insurance company's negligence the plaintiff would not have had to defend a personal injury lawsuit himself. Id. ¶¶ 11, 13. While the plaintiff presented evidence at trial of the existence of that personal injury lawsuit, it presented no calculation of its damages, i.e., the costs associated with the lawsuit. Id. ¶ 4. The defendant moved for directed verdict on the ground that plaintiff had not provided sufficient evidence of his damages, but the trial court denied the motion and this court affirmed. This court reasoned that, even though the plaintiff had provided no evidence of the costs associated with the personal injury lawsuit, by proving that plaintiff had, in fact, suffered damages, "the amount of damages would equal the costs related to the [personal injury] lawsuit that otherwise would have been covered by the policy." Id. ¶ 13. Thus, Renegade Oil confirms that evidence of the fact of damages is sufficient to preclude judgment as a matter of law even in the absence of a calculation of the amount of damages.

A recent Utah Supreme Court case provides further confirmation. Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶ 33, 116 P.3d 323. In Tobias, the court reversed the entry of summary judgment where the plaintiff provided evidence of the fact of damages, but not the amount of damages. Id. In Tobias, plaintiff provided evidence that it had paid more for real estate due to defendants' misrepresentation, but provided no evidence of how much more it had paid. Id. The Utah Supreme Court nonetheless reversed the entry of summary judgment because even this "thin" evidence was sufficient to present a non-speculative question of fact concerning damages for trial. Id. Again, proof that

defendants' conduct was the proximate cause of damages is sufficient to preclude summary judgment, even in the absence of a quantification of those damages.

B. Stevens-Henager Provided Evidence That Eagle Gate's Unlawful Conduct Was the Proximate Cause of Damages to Stevens-Henager

Stevens-Henager provided ample evidence of its damages and demonstrated that Eagle Gate's unlawful conduct was the proximate cause of those damages. Therefore, summary judgment was inappropriate.

Carol Gastiger, a Campus President of Stevens-Henager, testified that when Eagle Gate engaged in predatory hiring of Stevens-Henager employees, had those employees steal computer files from Stevens-Henager, and then used those stolen files to undermine Stevens-Henager's efforts to recruit new students, Stevens-Henager suffered the following damages: (i) a "loss of the Tongan population" and the money Stevens-Henager spent recruiting that population; and (ii) reduced productivity from the loss of Stevens-Henager's "Admissions Consultant," where the stolen consultant had averaged 8 student recruits per month but her replacement averaged only 5 per month, which resulted in lost tuition dollars. (R. 3332-33.)

Ms. Gastiger even performed a calculation to demonstrate the extent of damages to Stevens-Henager. Ms. Gastiger testified that when you take the number of fewer students recruited by the replacement employee—3 per month—and "multiply that times tuition," then that is "real money, in my opinion, that's been lost." (R. 3332-33.) In addition, there is a straightforward way to determine the damages associated with the money Stevens-Henager spent recruiting the Tongan population before Eagle Gate illegally enticed the director of those recruiting efforts to join Eagle Gate and recruit the

same potential students. The costs of those undermined recruiting efforts are hard costs.³ Like Renegade Oil, the record here reveals a straightforward way to arrive at a dollar amount of damages—lost tuition from 3 fewer student recruits per month and the hard costs associated with marketing and recruiting efforts.

Vicki Dewsnup, another Campus President of Stevens-Henager and its Regional Director, testified about “tremendous damage” including (i) the costs of “advertising and marketing” that were ineffective when Eagle Gate misappropriated the student leads the advertising and marketing had generated; (ii) the inability of Stevens-Henager to contact its student leads because Eagle Gate’s unlawful conduct had left Stevens-Henager without “adequate phone numbers;” (iii) the “damage to morale at the campuses;” and (iv) the “loss of employees.” (R. 3333-34.)

Carl Barney, owner of Stevens-Henager, testified that Stevens-Henager had suffered damages of “many millions of dollars” from (i) the “loss of the [student] starts” for “at least two of the campuses, Provo and Ogden,” which led to a reduction in “an income stream over three or four years;” (ii) having “to rebuild the admissions department;” and (iii) the “decline in morale.” (R. 3334-35.)

Stevens-Henager therefore provided evidence that Eagle Gate’s unlawful conduct was the proximate cause of a number of different types of damages, including (i) the lost productivity of the experienced employees who joined Eagle Gate; (ii) the costs of hiring and training less experienced and less productive employees; (iii) the costs associated with advertising and marketing when Eagle Gate misappropriated the fruits of that

³ Stevens-Henager attributed a dollar amount of \$200,000 to these damages as early as the complaint. (R. 7-8.)

advertising and marketing; (iv) the effects of reduced morale on various campuses; and (v) the lost tuition payments from students who otherwise would have attended Stevens-Henager.⁴ This evidence is more than sufficient to create a question of fact concerning damages for the jury to consider and, more important, to prevent Eagle Gate from escaping entirely from compensating Stevens-Henager for the consequences of Eagle Gate's illegal conduct.

Because Eagle Gate's motion for summary judgment was fashioned to address only whether Stevens-Henager had suffered "any damages," when Stevens-Henager provided some evidence of damages, the motion should have been denied in its entirety. This court should reverse the order granting summary judgment to permit Stevens-Henager to present evidence of its damages to a jury.

II. This Court Should Vacate Subsequent Rulings Based Upon the District Court's Summary Judgment Ruling

If this court reverses the district court's grant of summary judgment, it also should reverse subsequent orders based upon the grant of summary judgment. McKee v. Williams, 741 P.2d 978, 982 (Utah Ct. App. 1987) ("Since the partial summary judgment set into play the entire chain of subsequent proceedings, we also reverse all subsequent orders and judgments and remand the case for trial."); see also Loporto v. Hoegemann,

⁴ The categories of damages are confirmed by Stevens-Henager's initial disclosures: "Such damage includes (1) damage to Stevens-Henager's goodwill resulting from Defendants' acts, (2) damage to or destruction of Stevens-Henager's lead lists, (3) damage resulting from Defendants' misappropriation of Stevens-Henager's lead lists, (4) lost investment and productivity due to Defendants' predatory hiring of key Stevens-Henager personnel, (5) lost revenues due to an untold number of prospective students electing not to attend Stevens-Henager as a result of defendants' unlawful and unfair competition, etc." (R. 3700.)

1999 UT App 175, ¶ 15, 982 P.2d 586 (“we reverse the trial court’s entry of default and subsequent orders based on that default”).

In this case, there are at least three subsequent orders based upon the district court’s summary judgment ruling. First, on May 30, 2008, the district court granted Eagle Gate’s motion to strike the report of Stevens-Henager’s damages expert “[b]ased on the Court’s prior rulings,” including the rulings on Eagle Gate’s motion for summary judgment and Stevens-Henager’s motion to reconsider the order granting summary judgment. (R. 3994.) Second, on August 31, 2009, the district court granted Eagle Gate’s motion in limine to exclude any evidence of monetary damages—a motion necessary only because there is evidence of monetary damages—on the ground that the remaining prayer for injunctive relief does not require proof of damages, and therefore, evidence of monetary damages is irrelevant. (R. 4368.) Third, on August 31, 2009, the district court dismissed Stevens-Henager’s claim for injunctive relief and attorney fees under the Federal Computer Fraud and Abuse Act on the ground that Stevens-Henager could not prove damages totaling at least \$5,000, a requirement under the Act. (R. 4366.)

Because these orders are based, at least in part, on the district court’s grant of summary judgment, if this court reverses the order granting summary judgment, this court should also vacate these subsequent orders to permit the district court to consider them in the absence of its summary judgment ruling.

Conclusion

This court should reverse the order granting summary judgment because, in opposing the motion for summary judgment, Stevens-Henager provided sufficient evidence of its damages through deposition testimony to create an issue of material fact

for trial. Because the district court erred in its summary judgment ruling, this court also should vacate all subsequent orders based upon that ruling.

DATED this 18th day of February, 2010.

SNELL & WILMER L.L.P.



Troy L. Booher
*Attorney for Appellant Stevens-Henager
College*

Certificate of Service

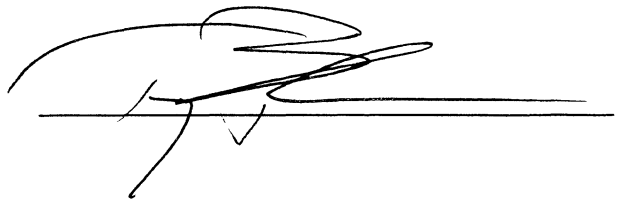
I HEREBY CERTIFY that on this 18th day of February, 2010, two true and correct copies of OPENING BRIEF OF APPELLANT were served via first-class mail, postage prepaid, on the following:

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Pro se Defendant

A handwritten signature in black ink, appearing to be 'W. Rogers', written over a horizontal line.

Addenda

- Addendum A: Memorandum Decision dated January 30, 2008
- Addendum B: Order Granting Summary Judgment Against Plaintiff On Its Claims Against Eagle Gate College, Provo College And Jana Miller (Breach Of Contract; Violation Of The Uniform Trade Secret Act; Interference With Contractual Relations; Violation Of The Federal Computer Fraud And Abuse Act; Statutory Unfair Competition; And Civil Conspiracy) dated March 10, 2008
- Addendum C: Minute Entry dated May 12, 2008
- Addendum D: Minute Entry dated May 30, 2008
- Addendum E: Memorandum Decision dated August 31, 2009

Tab A

11/23/08

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STEVENS-HENAGER COLLEGE,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 040921860
vs.	:	
EAGLE GATE COLLEGE, PROVO COLLEGE,	:	
MOSESE IONGI, TREVOR SMITH,	:	
WALLACE ROGERS, RICHARD HORWITZ,	:	
STEVEN TODD KNECHT and JANA MILLER,	:	
Defendants.	:	

This matter came before the Court on January 22, 2007, in connection with Defendants Eagle Gate College, Provo College and Jana Miller's Motion for Summary Judgment. The Court will refer to these parties herein as the "Eagle Gate Parties." At the conclusion of the hearing, the Court took the matter under advisement to further consider the parties' respective legal positions, their written submissions and counsel's oral argument. The Court should note that during the hearing, a representative of Eagle Gate College was permitted to speak briefly on the issue of what was contained in documents that were produced by the Eagle Gate Parties in November of 2007. While these statements provided helpful clarification, the Court did not rely on them in forming its decision on the pending Motion for Summary Judgment. The Court rules on that Motion as stated herein.

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LEGAL ANALYSIS

The Eagle Gate Parties' Motion for Summary Judgment asserts that the Plaintiff has failed to provide the basis for and a calculation supporting its damages claim. The Plaintiff counters that an expert opinion concerning damages has been delayed because the Eagle Gate Parties have only recently provided information necessary to compute damages.

Notably, the parties agree that expert testimony is needed in order to establish damages in this case. Further, in reviewing the procedural history of this matter, which spans over four years, it is apparent that the Plaintiff has had ample opportunity to designate an expert on damages, to formulate the basis of its damages claim and to provide an expert report concerning the same.

During the hearing, it became clear that the information which would substantiate such damages is, at least in part, in the Plaintiff's own possession. Further, the Court is satisfied that through discovery the Plaintiff has been able to glean the remaining information necessary for its experts to assess damages and to issue a report concerning the same. In reaching this conclusion, the Court carefully considered, but was unpersuaded by the Plaintiff's theory that the information provided by the Eagle Gate Parties was "substantially incomplete" until the November supplementation. In this regard, the Plaintiff relies heavily on the fact that the Court previously ordered supplementation of a "lead list"

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and spreadsheet provided by the Eagle Gate Parties, to the extent that this information was incomplete. To be clear, the Court determines that even in the absence of such supplementation, the Plaintiff had already been provided sufficient information for its experts to calculate damages. Despite this, the Plaintiff has failed to produce any calculations or expert reports concerning damages and all relevant deadlines have now passed.

Counsel for the Plaintiff alluded to having previously sought to extend the deadlines in this case and indicated that the Court had not yet ruled on that Motion. The Plaintiff did file a Motion to Extend the Dates Set Forth in the Order Granting Plaintiff's to Extend Discovery Period on June 26, 2007. It appears that this Motion may have been overlooked because of the flurry of other Motions which were pending at that time. However, as the Court pointed out during the hearing, the Plaintiff has effectively had nearly six months (rather than the 60 days sought) to have its experts complete their expert reports on damages. Despite the passage of this extensive time period, the Plaintiff is apparently no closer to submitting an expert report than it was when the request for extension was filed.

It should also be noted that the Plaintiff has requested extensions in the past, which the Court has previously granted. However, at this juncture, there is simply no excuse or justification for the Plaintiff's delays in providing expert reports and computations of its damages.

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Indeed, while the Plaintiff had sufficient information to formulate the basis for its damages claim and to provide expert reports, even if on a preliminary basis, it apparently made a tactical decision not to do so. The Plaintiff, and not the Eagle Gate Parties, bears responsibility for having failed in this regard.


The Court is similarly unpersuaded by counsel's suggestion that until causation could be assessed, it was impossible for the Plaintiff to calculate damages. The factual issues surrounding causation in this case are not the subject of expert testimony and would not preclude the Plaintiff from making the separate assessment of damages (again, even if on a preliminary basis).

Overall, the Court determines that despite this late stage in the litigation, the Plaintiff has failed entirely to substantiate its damages claim. Further, the Court is simply not persuaded that the Plaintiff has been unable to do so because of a lack of information. The Court reiterates that the Plaintiff has had sufficient information to compute damages, but has failed to produce any calculations or expert reports to substantiate its damages claim and the time for doing so has now expired. In the absence of evidence to substantiate the damages element of the Plaintiff's claims, the Court grants summary judgment in favor of the Eagle Gate Parties.

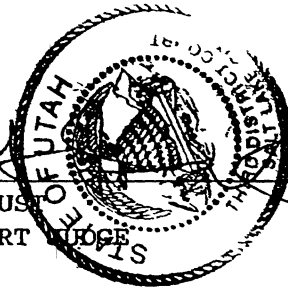
Counsel for the Eagle Gate Parties is to prepare an Order consistent, but not limited to, this Memorandum Decision, indicating that

their Motion for Summary Judgment is granted. Counsel should include a procedural history detailing the information provided, extensions granted and the Plaintiff's failure to produce expert reports or calculations of damages (despite repeated requests by the Eagle Gate Parties).

Dated this 30th day of January, 2008.



ROBERT P. FAUST
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 31 day of January, 2008:

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Pat Jones

Tab B

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FILED DISTRICT COURT
Third Judicial District

MAR 10 2008

By  SALT LAKE COUNTY
Deputy Clerk

Attorneys for Eagle Gate College, Provo College and Jana Miller

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

STEVENS-HENAGER COLLEGE,

Plaintiff,

vs.

**EAGLE GATE COLLEGE, PROVO
COLLEGE, MOSESE IONGI, TREVOR
SMITH, WALLACE ROGERS,
RICHARD HORWITZ, STEVEN TODD
KNECHT and JANA MILLER,**

Defendants.

**ORDER GRANTING SUMMARY
JUDGMENT AGAINST PLAINTIFF ON
ITS CLAIMS AGAINST EAGLE GATE
COLLEGE, PROVO COLLEGE AND
JANA MILLER (Breach Of Contract;
Violation Of The Uniform Trade Secret
Act; Interference With Contractual
Relations; Violation Of The Federal
Computer Fraud And Abuse Act;
Statutory Unfair Competition; And Civil
Conspiracy)**

Case No. 040921860

Judge Robert Faust

Eagle Gate College, Provo College, and Jana Miller's (the "Eagle Gate Parties") Motion for Summary Judgment (re: Claims Against Eagle Gate College, Provo College and Jana Miller) came on for hearing before the Court on January 22, 2008. The Eagle Gate Parties were

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represented by Thomas R. Karrenberg, Nathan B. Wilcox and Jennifer R. Eshelman of Anderson & Karrenberg. Plaintiff was represented by Robert E. Mansfield, Scott M. Lilja and Lisa B. Bohman of VanCott Bagley Cornwall & McCarthy. The Court, having carefully reviewed and considered the pleadings and papers submitted by the parties with respect to the Motion, and having rendered its Memorandum Decision on January 30, 2008, hereby enters the following order:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

For the reasons set forth in the Memorandum Decision dated January 30, 2008, and set forth in further detail below, the Eagle Gate Parties' Motion for Summary Judgment is granted. Plaintiff's claims for Breach of Contract, Violation of the Uniform Trade Secrets Act, Interference with Contractual Relations, Interference with Prospective Economic Relations, Violation of the Federal Computer Fraud and Abuse Act, Statutory Unfair Competition, and Civil Conspiracy are hereby dismissed with prejudice.

Procedural History

On October 16, 2004, Plaintiff filed its Complaint against the Eagle Gate Parties, among others, asserting claims for Breach of Contract,¹ Violation of the Uniform Trade Secrets Act, Interference with Contractual Relations, Interference with Prospective Economic Relations, Violation of the Federal Computer Fraud and Abuse Act, Statutory Unfair Competition, and

¹ The Breach of Contract Claim was only asserted against Ms. Miller.

Civil Conspiracy. (Statement of Facts (“SOF”) ¶¶ 1 and 2.)² For its causes of action, Plaintiff claimed over three years ago that it had incurred, and was therefore entitled to, damages in amounts “not less than” \$10,250,000.00. (See Compl. pp. 27 – 30.)³ Despite the averments in its Complaint of damages of not less than \$10,250,000.00, on November 15, 2004, Plaintiff represented in its Initial Disclosures that it had “not yet computed the damages it has suffered as alleged in the Complaint.” (SOF ¶ 5.)

On November 18, 2004, counsel for the Eagle Gate Parties sent a letter to Plaintiff’s counsel requesting that in light of the allegations in Plaintiff’s Complaint of damages in specified minimum amounts and its admission that it had not computed any damages, Plaintiff either supplement its Initial Disclosures or amend its Complaint. (SOF ¶ 6.) Counsel for Plaintiff responded that

² The Eagle Gate Parties’ Motion for Summary Judgment cited to a “Statement of Facts.” Plaintiff responded to facts nos. 1, 2, 3, 10, 15, 20, 21, 23, 24, 26, 27, 28, 29, and 31, as “Undisputed” or “Undisputed and immaterial,” and facts nos. 4, 5, 6, 14, 22, as “Undisputed but incomplete” and cited additional information. These facts are uncontroverted pursuant to Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure and deemed admitted.

³ Specifically, Plaintiff alleges in its Complaint that it was entitled to damages against the Eagle Gate Parties in the following amounts for the following claims:

“not less than the sum of \$250,000” -- breach of contract against Ms. Miller individually (see Compl. p. 27);

“not less than the sum of \$1,000,000” -- violation of the Uniform Trade Secrets Act (see Compl. p. 28);

“not less than the sum of \$1,000,000” -- interference with contractual relations (see *id.*);

“not less than the sum of \$1,000,000” -- interference with prospective economic relations (see Compl. p. 29);

“not less than the sum of \$1,000,000” -- violation of the Computer Fraud and Abuse Act (see *id.*);

“not less than the sum of \$1,000,000” -- statutory unfair competition (see Compl. p. 30; and

“not less than the sum of \$5,000,000” -- civil conspiracy (see *id.*).

(SOF ¶ 3.)

“Plaintiff was not able to give a detailed computation of its damages at that point in the litigation.”
(Plaintiff’s Responses to SOF ¶ 6.)

Thereafter, the Eagle Gate Parties’ counsel contacted Plaintiff’s counsel to request that Plaintiff identify the factual basis for its claim in its Complaint that it had damages in excess of \$10,000,000.00, including the computation thereof. (SOF ¶ 7.⁴) In response, Plaintiff’s counsel represented that the computations were simply an estimate made by some of the members of Plaintiff’s management as to the amount of Plaintiff’s damages, but that there were not any specific documents or computations on which Plaintiff based its damages allegations in its Complaint. (SOF ¶ 7.)

On December 15, 2004, the Eagle Gate Parties sent a letter to Plaintiff’s counsel asking for clarification of Plaintiff’s counsel’s representation that “the calculation of [damages], as set forth in [the] Complaint, was simply a guess by some members of management as to the damages that [Plaintiff] may have incurred” and requesting that Plaintiff comply with its obligations under Rule 26 of the Utah Rules of Civil Procedure. (SOF ¶ 8.⁵)

On December 2, 2004, the Eagle Gate Parties served Plaintiff with Defendants Eagle Gate College, Provo College, Richard Horwitz and Jana Miller’s First Request for Production of Documents. (SOF ¶ 9.) In their Requests for Production of Documents, the Eagle Gate Parties requested that Plaintiff produce “any and all documents that evidence, refer or relate to, or are

⁴ In response to SOP ¶ 7, Plaintiff made a statement about what it did not dispute, but failed to controvert any of the facts set forth therein. Thus, the facts set forth in SOP ¶ 7 are deemed admitted.

⁵ In response to Statement of Fact No. 8, Plaintiff does not dispute that the letter was sent or the content of the letter.

sufficient to ascertain any damages Stevens-Henager claims to have suffered as a result of any of the Defendant's purported misappropriation of the 'lead list' or other trade secrets." The Eagle Gate Parties further requested the production of "all documents that evidence, refer or relate to, or are sufficient to ascertain any damages Plaintiff allegedly suffered as a result of [the alleged actions of the Defendants] including, but not limited to, any computation of such alleged damages." (SOF ¶10.)

On January 10, 2005, Plaintiff responded to each of the Eagle Gate Parties' Requests for Production of Documents relating to damages with a verbatim restatement of the explanation set forth in its Initial Disclosures: "[Plaintiff] has not yet computed the damages it has suffered To the extent any of these categories of damages can be quantified, [Plaintiff] will supplement these responses when sufficient information is available by which to make such calculations." (SOF ¶11⁶ and Response thereto.)

On July 1, 2005, the Eagle Gate Parties filed a Motion to Compel seeking an order from the Honorable Judge Steven Roth compelling Plaintiff to, *inter alia*, (a) amend its Initial Disclosures to provide a damage computation and (b) appropriately respond to the Eagle Gate Parties' discovery requests regarding damages. (See Mot. to Compel and for Sanctions, July 1, 2005.) After hearing oral argument on the matter, Judge Roth ordered Plaintiff to respond to the Eagle Gate Parties' document requests regarding damages. (See Order Re: Mot. to Compel and for Sanctions, December 30, 2005.) In response to Judge Roth's Order compelling Plaintiff to

⁶ Plaintiff purported to dispute SOF ¶ 11, but the cited evidence does not controvert it. Thus, it is admitted.

produce documents that support its damage claims, in early January 2006, Plaintiff produced documents purporting to summarize the “starts” at its various campuses from 2003 to 2005 by month and quarter and Quick Books print outs titled General Ledger and Trial Balance for Plaintiff at its various campuses. (SOF ¶ 16.⁷) None of the documents produced contained any calculations of damages or explanation as to how the documents supported or evidenced Plaintiff’s claim of damages in excess of \$10,000,000.00. (SOF ¶ 19.⁸)

On January 12, 2006, counsel for the Eagle Gate Parties again requested in writing that Plaintiff provide the underlying documents supporting the summaries and other documents that Plaintiff claimed supported its damages. (SOF ¶ 17.⁹) Plaintiff, however, did not respond to the request by counsel. (SOF ¶ 17.)

On June 9, 2006, counsel for the Eagle Gate Parties sent another letter to counsel for Plaintiff asking Plaintiff to confirm that there were no other documents relating to Plaintiff’s claim of over \$10,000,000.00 in damages beyond the summaries of starts and the General Ledgers and Trial Balances. (SOF ¶ 18.) Plaintiff’s counsel did not respond. (SOF ¶ 18.¹⁰)

On or about January 17, 2007, Jana Miller served her First Set of Interrogatories on Plaintiff. (SOF ¶ 20). Many of Ms. Miller’s Interrogatories asked Plaintiff to identify “[a]ll

⁷ Although Plaintiff purports to dispute this fact, the affidavit testimony it cites to controvert it does not controvert it and it is deemed admitted under Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure.

⁸ Although Plaintiff purports to dispute this fact, the deposition testimony it cites to controvert it does not controvert it and it is deemed admitted under Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure.

⁹ Although Plaintiff purports to dispute this fact and labels it as immaterial, claiming that it need not respond to informal requests for documents, the affidavit testimony it cites to controvert it does not controvert it and it is deemed admitted under Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure.

¹⁰ Although Plaintiff purports to dispute this fact and labels it as immaterial, claiming that it need not respond to informal requests for documents, the affidavit testimony it cites to controvert it does not controvert it and it is deemed admitted under Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure.

damages that [Plaintiff] claim[s] to have [or purportedly] suffered as a result of [the alleged acts of Ms. Miller], including a detailed statement of the method of the calculation of any such damages and any facts [Plaintiff] relied upon in computing any alleged damages.” (SOF ¶ 21.) Plaintiff repeatedly responded to the above referenced requests for information concerning the identification and calculation of damages by simply stating that “Plaintiff’s experts will provide information and analysis concerning the damages suffered.”(SOF ¶ 22.)

Similarly, on or about January 17, 2007, Eagle Gate and Provo College served their First Set of Interrogatories on Plaintiff. (SOF ¶ 23.) Eagle Gate and Provo College’s Interrogatories asked Plaintiff to identify “[a]ll damages that [Plaintiff] purportedly suffered as a result of [the various alleged acts of Eagle Gate or Provo College], including a detailed statement of the method of the calculation of any alleged damages and any facts [Plaintiff] relied upon in computing any alleged damages.” (SOF ¶ 24.) Plaintiff repeatedly responded to the requests for information concerning damages by stating that “Plaintiff’s experts will provide information and analysis concerning the damages suffered.” (SOF ¶ 25¹¹.)

In November, 2006, the parties filed a Second Joint Motion to Amend Scheduling Order and the Second Amended Scheduling Order was entered by Judge Skanchy on November 16, 2006. The November 16, 2006 Order established a fact discovery deadline of February 28, 2007, and a deadline for expert witness reports of March 9, 2007. On March 7, 2007, Plaintiff filed a

¹¹ Although Plaintiff purports to dispute this fact, the affidavit testimony it cites to controvert it does not controvert it and it is deemed admitted under Rule 7(c)(3)(A) of the Utah Rules of Civil Procedure.

motion to extend the discovery cutoff in the case. The basis for its request for an extension of the discovery cutoff was specifically stated in its Reply Memorandum as follows:

In seeking an extension to conduct fact discovery, Plaintiff seeks additional time for only two purposes. First, it seeks an extension to permit its experts to review the hard drive of Jana Miller...and to follow up on any additional discovery arising from that review. Second, it seeks an extension to conduct the out-of-state deposition of Todd Knecht, a party to this action whose whereabouts had previously been unknown.

On April 18, 2007, the Court granted Plaintiff's Motion and extended the pertinent deadlines by sixty days, establishing the new deadline for the completion of all fact discovery as June 18, 2007, and the deadline for Plaintiff to provide any expert witness reports as June 28, 2007. Beyond conducting the deposition of Mr. Knecht on June 12, 2007, Plaintiff conducted no further discovery during the extended discovery period.

On June 6, 2007, Plaintiff filed a Motion to Compel Defendant's Discovery Responses seeking an order compelling contact information for former employees of Plaintiff who had subsequently worked for either Eagle Gate College or Provo College¹² and to "produce a copy of Eagle Gate College's database in its original format." The Motion was based, in relevant part, on its requests seeking "Copies of each lead list prepared, accessed, modified, or otherwise used in carrying out his or her responsibilities to Eagle Gate College by Jana Miller, Todd Knecht and Wallace Rogers" and "Documents sufficient to ascertain each and every change or alteration to any **lead list** owned, possessed, or otherwise controlled by Eagle Gate College that were made by Jana Miller, Todd Knecht, and Wallace Rogers."

¹² This information was subsequently provided.

Eagle Gate and Provo College opposed the Motion, asserting that neither of the document requests that Plaintiff referenced requested the production of the entirety of Eagle Gate's database. On July 26, 2007, the Court, accordingly entered a Minute Entry ruling that because Plaintiff had not requested the database in discovery, the Court could not compel its production. The Court also noted, based on the pleadings submitted, that Eagle Gate College and Provo College had appropriately responded to the requests by compiling a list of 37,000 names of potential students and their contact information and provided a spreadsheet identifying changes made to the database by Jana Miller.

On June 20, 2007, in response to interrogatories from Plaintiff, Provo College and Eagle Gate College produced hard copies of spreadsheets identifying all of the "self-generated" leads for the individual defendants in this matter.

On June 25, 2007, Plaintiff filed another Motion to Extend the discovery period seeking to extend all of the discovery deadlines and other dates by sixty days from the entry of an order granting the Motion to Extend. Plaintiff alleged that it required the requested extension so that it could review Eagle Gate College's electronic database in "native format" (a request the Court had already declined to compel because it had not been requested in discovery), and to depose individuals who formerly worked for Plaintiff who had since worked for Eagle Gate or Provo College—a heretofore unmentioned reason for extending discovery. Thereafter, the Plaintiff did not do any further discovery of the Eagle Gate Parties.

On October 9, 2007, the Eagle Gate Parties filed their Motion for Summary Judgment on all of Plaintiff's claims against them. In the summary judgment motions, the Eagle Gate Parties

alleged that (a) Plaintiff had failed to provide a basis for, and a calculation of, its damages claim, (b) Plaintiff had failed to provide any expert reports substantiating its damages (which it had claimed was necessary), and (c) the time for providing expert reports or expert discovery and fact discovery had passed. Plaintiff opposed the motion for summary judgment alleging that it needed an expert witness to provide a calculation of its damages set forth in its Complaint filed in October 2004, and that it had been unable to provide an expert report during the preceding three years because the Eagle Gate Parties had only recently provided the information necessary for it to do so.

It is uncontrovertable, however, that based upon what Plaintiff alleges are the categories of its damages, it is Plaintiff – not the Eagle Gate Parties – that possesses material information relating to the calculation of Plaintiff's damages. It is also undisputed that the information that Plaintiff alleges that it needs from the Eagle Gate Parties to compute its damages has been, at least in part, in Plaintiff's possession since before Plaintiff commenced this litigation. Specifically, in opposition to the Eagle Gate Parties' Motion, Plaintiff submitted the deposition testimony of Plaintiff's President, Carl Barney, in which Mr. Barney testified that Plaintiff's damages consisted of "[t]he loss of starts," "[t]he cost of hiring and training new people" and "[t]he efforts to rebuild the admissions department."

Plaintiff's briefing characterized its damage claim as including "an analysis of the impact of Defendants' breach of employment contracts on Stevens-Henager enrollment rates and the value of Plaintiff; and an analysis of the increased costs and decreased productivity caused by Defendants' poaching of Plaintiff's employees."

Plaintiff, not the Eagle Gate Parties, possesses the information necessary to calculate its alleged damages the loss of employees had on its enrollment rates, the cost of hiring and training new people, and the cost of rebuilding its admissions department. Yet, it has supplied no calculation or evidence regarding these damages whatsoever supporting its damages claims. Plaintiff indicated at the hearing that these damages were not the main damages sought by Plaintiff. The Court finds this troubling in light of the fact that Plaintiff's Complaint seeks damages in an amount "not less than the sum of \$1,000,000" against the Eagle Gate Parties for interfering with its contractual relations with its employees.¹³

Even if these damages are not the main damages sought by Plaintiff, the fact remains that it had a duty to compute them and provide them to the Eagle Gate Parties pursuant to Rule 26 and the Court's multiple scheduling orders and did not. Moreover, the Eagle Gate Parties provided Plaintiff with sufficient information for its expert(s) to calculate, even if preliminarily,¹⁴ the other damages Plaintiff claims.¹⁵

¹³ To allege damages in its Complaint in good faith as "not less than" sums, Plaintiff must have engaged in some form of computation. Indeed, Rule 11 mandates that Plaintiff's allegations must be based upon some reasonable inquiry or belief and have an evidentiary basis. See Utah R. Civ. P. 11(b)(3); see also *Rhineheart v. Stauffer*, 638 F. 2d 1169, 1171 (9th Cir. 1980) (before filing complaint, attorney has duty to "ascertain that the damages sought appear to bear a reasonable relation to injuries actually sustained"); *Hudson v. Moore Business Forms, Inc.*, 836 F. 2d 1156, 1162 (9th Cir. 1987) (damages alleged in prayer for relief "must meet the Rule 11 standard of reasonableness"). Plaintiff's repeated admission that it has not computed its damages is a tacit admission that the allegations of damages in its Complaint in amounts of "not less than" \$250,000.00, \$1,000,000.00, and \$5,000,000.00 violate Rule 11. See *Simpson v. Chesapeake & Potomac Tel. Co.*, 522 A. 2d 880, 884 (D.C. 1987) (response to discovery request that answer will be supplied "as discovery continues" is "strong circumstantial evident" that plaintiff lacked basis for claims at time of filing; if plaintiff's complaint was based on any pre-filing investigation, plaintiff should have revealed that information in discovery).


¹⁴ Plaintiff's counsel indicated at the hearing of this matter that Plaintiff chose not to provide a preliminary analysis due to a concern that it would somehow be used against them at the trial of this

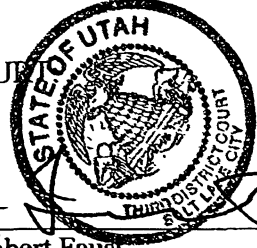
Plaintiff has failed and refused to substantiate its damages in over three years of litigation. Instead, Plaintiff has repeatedly stated the information would be provided through its expert witness report(s). The deadlines for discovery and expert witness reports have now come and gone four times with no expert report or computation of damages from Plaintiff. Because damages are an essential element of each of Plaintiff's claims against the Eagle Gate Parties, the Eagle Gate Parties are entitled to dismissal of Plaintiff's claims against them as a matter of law.

There is no excuse or justification for Plaintiff's failure to provide expert reports and computations of its damages. Accordingly, the time for Plaintiff to have substantiated its damages having passed, Plaintiff's claims against the Eagle Gate Parties are hereby dismissed with prejudice.

DATED: March 16th, 2008

BY THE COURT


HONORABLE ROBERT FAUST
THIRD DISTRICT COURT JUDGE



matter. Plaintiff's tactical decision not to provide timely expert reports is not the responsibility of the Eagle Gate Parties and Plaintiff alone bears the responsibility for failing to do so.

¹⁵ Plaintiff's suggestion at the hearing that it needed additional information in order to demonstrate causation is also unpersuasive. The causation aspect of Plaintiff's case is not within the domain of its damages expert and would not preclude the Plaintiff from making an assessment of damages, even if only a preliminary assessment.

Tab C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STEVENS-HENAGER COLLEGE,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 040921860
vs.	:	
EAGLE GATE COLLEGE, PROVO COLLEGE,	:	
MOSESE IONGI, TREVOR SMITH,	:	
WALLACE ROGERS, RICHARD HORWITZ,	:	
STEVEN TODD KNECHT and JANA MILLER,	:	
Defendants.	:	

The Court has before it the Plaintiff's Motion for Relief From or For Reconsideration of the Court's Order on Summary Judgment. Having reviewed the moving and responding memoranda, the Court rules as stated herein.

After considering the parties' respective positions, the Court determines that the Plaintiff's current Motion, with respect to the issue of damages, is simply an attempt to re-argue or bolster the arguments made in its original opposition. However, even considering these re-arguments, the Court remains convinced that the Plaintiff had adequate information such that it could submit timely expert reports (even if on a preliminary basis) to substantiate damages. The Plaintiff's ability

to provide such a report shortly after the Court rendered its summary judgment decision (with no additional discovery) confirms this reality. The Court further concludes that the Plaintiff has not met the standard for excusable neglect. It was simple inaction and lack of diligence on the part of the Plaintiff that led to the Court's ultimate decision to grant summary judgment. The Court can find no legal or factual grounds to reconsider this decision.

There is an issue, however, as to whether the Plaintiff's equitable claims were subject to the Defendants' Motion for Summary Judgment. It does not appear that the Plaintiff's equitable claims were part of the Defendants' initial Motion, which was geared primarily to the lack of evidence to substantiate the Plaintiff's damages claim. The Court agrees that it was improper for this aspect of the Plaintiff's claims to be dismissed in a summary fashion, when the issue of whether the Plaintiff is indeed entitled to injunctive relief has never been fully briefed. The Court concludes that those claims survive. To the extent that the Court's prior Order may be inconsistent with this, it should be modified to accurately reflect that the equitable claims were not subject to the Motion for Summary Judgment.


In closing, the Court notes that the Defendants have raised legal arguments as to the viability of the Plaintiff's equitable claims. Such

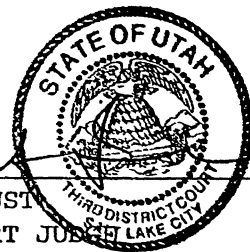
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arguments are more properly brought in the form of a dispositive motion, rather than an opposition to a Motion to Reconsider (particularly where those arguments were not made in the underlying Motion for Summary Judgment). The Court will not consider the substantive merits of those arguments in their current context.

This Minute Entry decision will stand as the Order of the Court, granting the Plaintiff's Motion to Reconsider in part and denying it in part.

Dated this 12th day of May, 2008.


ROBERT P. FAUST
DISTRICT COURT JUDGE
THIRD DISTRICT COURT
SALT LAKE CITY



3989

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 12th day of May, 2008:

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Pat Jones

Tab D

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STEVENS-HENAGER COLLEGE,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 040921860
vs.	:	
EAGLE GATE COLLEGE, PROVO COLLEGE,	:	
MOSESE IONGI, TREVOR SMITH,	:	
WALLACE ROGERS, RICHARD HORWITZ,	:	
STEVEN TODD KNECHT and JANA MILLER,	:	
Defendants.	:	

The Court has before it a request for decision filed by Defendants Eagle Gate College, Provo College and Jana Miller seeking a ruling on their Motion to Strike Preliminary Expert Witness Report of Brad Townsend and the Affidavit of Brad Townsend. Based on the Court's prior rulings, including its recent ruling with respect to the Plaintiff's Motion for Relief From or For Reconsideration of the Court's Order on Summary Judgment, and on the grounds articulated in the Defendants' Motion to Strike, the Court determines that this Motion is well-taken and therefore granted.

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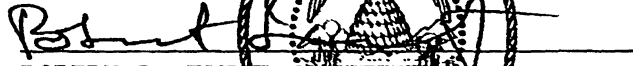
STEVENS-HENAGER COLLEGE
V. EAGLE GATE COLLEGE

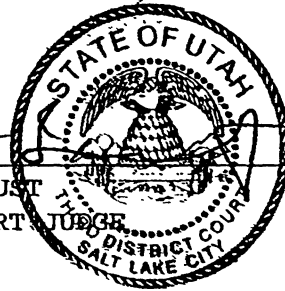
PAGE 2

MINUTE ENTRY

This Minute Entry decision will stand as the Order of the Court.

Dated this 31st day of May, 2008.


ROBERT P. FAUST
DISTRICT COURT JUDGE



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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 30 day of May, 2008:

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Tab E

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STEVENS-HENAGER COLLEGE,	:	MEMORANDUM DECISION
	:	
Plaintiff,	:	CASE NO. 040921860
	:	
vs.	:	
	:	
EAGLE GATE COLLEGE, PROVO COLLEGE,	:	
MOSESE IONGI, TREVOR SMITH,	:	
WALLACE ROGERS, RICHARD HORWITZ,	:	
STEVEN TODD KNECHT and JANA MILLER,	:	
	:	
Defendants.	:	

This matter came before the Court for a hearing on July 28, 2009, in connection with the following Motions: Defendants Eagle Gate College, Provo College and Jana Miller's (the "Defendants") Motion in Limine to Exclude Evidence of Monetary Damages, Motion in Limine to Exclude Any Login Tracking Lists that Purport to Show Jana Miller's Alleged Access of Plaintiff's Database and Related Testimony, Motion for Summary Judgment, Motion to Strike Portions of Plaintiff's Statement of Facts and Motion to Strike Portions of the Declaration of Vicky Dewsnup and Related Portions of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. Also before the Court was the Plaintiff's Motion for Partial Summary Judgment and Motion to Strike. At the conclusion of the hearing, the Court took these various Motions under advisement for further consideration of the relevant legal authorities, the parties'

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written submissions and counsel's oral argument. Being now fully informed, the Court rules as stated herein.

LEGAL ANALYSIS

At the outset, the Court notes that the parties' various Motions to Strike are denied. The Court has noted the procedural and evidentiary objections advanced in these Motions, but declines to strike the matters at issue. Rather, the Court will consider these matters for what they are worth, bearing in mind the objections made.

That brings the Court to the crux of the parties' arguments, as raised in their respective Motion for Partial Summary Judgment and Motion for Summary Judgment. These Motions pertain to the Plaintiff's request for permanent injunctive relief under the following claims: (1) Utah Uniform Trade Secrets Act; (2) interference with current and prospective economic relationships; (3) Federal Computer Fraud and Abuse Act ("CFAA"); and (4) the Utah Unfair Competition Act.

In seeking summary judgment, the Plaintiff asserts that based on the undisputed facts, certain of the Defendants accessed its database while in the scope of their employment with Eagle Gate and Provo College and then used this information, including lead lists, to recruit the Plaintiff's employees and/or to solicit prospective students. The Plaintiff maintains that injunctive relief is required in order to prevent future incidents of the Defendants illegally accessing its confidential database or using information already obtained.

The Defendants, in turn, seek summary judgment on the basis that the Plaintiff's claim for injunctive relief fails as matter of law because there is no possible threat of ongoing or future harm. With respect to the Plaintiff's claims under the CFAA, the Defendants argue that based on the Court's prior rulings concerning damages, this claim fails as a matter of law. The Defendants further argue that injunctive relief is unavailable under the Unfair Competition Act.

After considering the parties' respective legal positions, the Court agrees with the Defendants as to the Plaintiff's claim for injunctive relief under the CFAA. In light of the Court's prior rulings, the Plaintiff cannot substantiate damages aggregating at least \$5,000 in value and therefore cannot meet the statutory threshold for bringing a civil action under the CFAA. Further, consistent with the Court's prior observations, Ms. Dewsnup's general testimony concerning damages is not sufficient in this regard.

The Court also agrees with the Defendants with respect to the Unfair Competition Act. Reading the plain language of the Act, it does not appear that injunctive relief is provided for as a possible remedy under the Act. Accordingly, the Court grants the Defendants' Motion for Summary Judgment as to the Plaintiff's claims for injunctive relief under the CFAA and the Unfair Competition Act.

However, with respect to the Plaintiff's remaining claims for injunctive relief, the Court is not convinced that the evidence clearly

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demonstrates that these claims are moot. "The issue of injunctive relief is moot when the 'events make it absolutely clear the alleged wrongful behavior could not reasonably be expected to recur.'" Modular Mining Systems, Inc. v. Jigsaw Technologies, Inc., 2009 WL 1162893 (Ariz. App. Div. 2) (quoting SAL Leasing, Inc. v. State ex. rel. Napolitano, 10 P.3d 1221, 1221 (Ariz. App. 2000) (internal citations omitted) (emphasis added)). The Court is not persuaded that the facts in this case make it "absolutely clear" that there exists no threat of future harm. Instead, the Court determines that this issue, as presented in this specific case, is factually intensive and warrants a trial on the Plaintiff's entitlement to injunctive relief. The record before the Court indicates that some level of improper access did occur previously. The mere fact that the employees who were involved in this activity were fired is not sufficient for the Court to determine that the case has necessarily been rendered moot, particularly where the future value of the information obtained remains in dispute.

The Plaintiff's Motion likewise presents a set of factual issues, particularly with respect to the scope of prior access, the value of the information allegedly acquired, the extent of solicitation of prospective students based on lead lists and the quality and value of the information obtained for future purposes. Again, these are matters that the Court cannot determine summarily.

Notably, in their Motion for Summary Judgment, the Defendants suggest that the Plaintiff's claims fail simply because they cannot prove damages (based on the Court's prior rulings). At the same time, however, the Defendants' Motion in Limine states that where the Plaintiff is merely seeking injunctive relief, monetary damages are not relevant. In that Motion, the Defendants correctly indicate that the Plaintiff "need not show monetary damages to establish the need for an injunction - rather, it must show the opposite: that it has suffered harm that is not compensable by monetary damages or any other legal remedy."

The Court agrees that with the exception of the CFAA, which brings the amount of damages to the forefront, the issue of damages with respect to the Plaintiff's remaining claims is indeed irrelevant. Therefore, contrary to the Defendants' argument in their Motion for Summary Judgment, the Plaintiff's inability to prove monetary damages does not provide a basis for granting summary judgment with respect to its claims for injunctive relief. Rather, if the Plaintiff can meet the standard concerning the threat of harm, for which it does not need to introduce evidence of monetary damages, it can potentially succeed in its equitable claims.

To summarize, the Court determines that there are a number of factual issues in this case which preclude the Court from determining as a matter of law whether or not injunctive relief is warranted in this case. Therefore, the Court denies the Plaintiff's Motion for Partial

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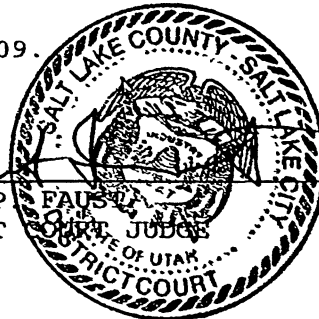
Summary Judgment in the entirety. The Defendants' Motion for Summary Judgment is granted in part and denied in part. Further, the Defendants' Motion in Limine regarding evidence of monetary damages is granted.

Finally, as to the Defendants' remaining Motion in Limine, the Court is unwilling to entirely exclude all login tracking lists, and related evidence, that potentially show access of the Plaintiff's database by Ms. Miller. The Court is willing to consider an adverse inference as a potential remedy for spoliation of evidence. The scope and content of this adverse inference will be addressed at the time of trial. The Defendants' Motion in Limine to exclude the login tracking lists is denied.

This Memorandum Decision will stand as the Order of the Court.

Dated this 31st day of August, 2009.


ROBERT P. FAUSCH
DISTRICT



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 31 day of August, 2009:

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